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UNITED STATES COPYRIGHT ROYALTY JUDGES

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IN THE MATTER OF:)

)

DETERMINATION OF RATES) Docket No.

AND TERMS FOR MAKING AND) 16-CRB-0003-PR

DISTRIBUTING PHONORECORDS) (2018-2022)

(PHONORECORDS III),)

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7 AND TERMS FOR MAKING AND) 16-CRB-0003-PR
8 DISTRIBUTING PHONORECORDS) (2018-2022)
9 (PHONORECORDS III),)
10 -----X
11 BEFORE: THE HONORABLE SUZANNE BARNETT
12 THE HONORABLE JESSE M. FEDER
13 THE HONORABLE DAVID R. STRICKLER
14 Copyright Royalty Judges
15
16 Library of Congress
17 Madison Building
18 101 Independence Avenue, S.E.
19 Washington, D.C.
20
21 April 13, 2017
22 9:08 a.m.
23 VOLUME XXI
24 Reported by:
25 Karen Brynteson, RMR, CRR, FAPR

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1 P R O C E E D I N G S

2 (9:08 a.m.)

3 JUDGE BARNETT: Good morning. Please be
4 seated. You all know how fond I am of housekeeping
5 because I begged you to come to my place and do it,
6 but at the conclusion of the hearing, all parties
7 are going to be submitting electronic versions of
8 the exhibits that were admitted during the hearing.

9 I just want to reemphasize that we don't
10 want scanned images. We want PDF files that are
11 searchable. And if you need to convert using OCR,
12 then that's what you'll need to do. The only things
13 that should be submitted as an image are those
14 things that you have no possible way of submitting
15 in any other form.

16 MR. SEMEL: Just to clarify, if I may,
17 for a document that was a native document, a
18 spreadsheet, do you want the native?

19 JUDGE BARNETT: We want the native, yes.
20 Please do not print 4,000 pages.

21 MR. SEMEL: Okay, good.

22 JUDGE BARNETT: Or even scan into a new
23 form.

24 MS. MAZZELLO: Actually, I have one other
25 housekeeping matter, unless Your Honors had

1 something else.

2 JUDGE BARNETT: That's all.

3 MS. MAZZELLO: All right. We just wanted
4 to notify you that a couple of the Services, Apple,
5 Spotify, and Pandora, are planning to serve a
6 motion, probably this afternoon, just seeking the
7 admission of one document into evidence. I notified
8 the Copyright Owners yesterday, but we wanted to
9 notify Your Honors as well so you would know that
10 it's coming.

11 And we also thought it might make sense
12 just to discuss the briefing schedule because we
13 know it's a holiday this weekend, and we don't want
14 -- we don't want the Copyright Owners to be stuck
15 with the three-day turnaround we've had throughout
16 this proceeding. We think it probably makes sense
17 to have -- we'll serve our brief, like I said, later
18 today, and their opposition due next Friday, which
19 would put that on the same schedule as the two
20 motions that they served on -- on Tuesday night.
21 And then Your Honors get everything on Monday, the
22 24th.

23 JUDGE BARNETT: Thank you. Mr. Scibilia?

24 MR. SCIBILIA: Good morning, Your Honor.
25 We, the Copyright Owners, object to this motion that

1 the Services want to make.

2 JUDGE BARNETT: I am shocked. Shocked.

3 MR. SCIBILIA: Yeah, right? Sort of like
4 in Casablanca, "I'm shocked." The Services are
5 trying to revisit an evidentiary ruling in this case
6 that was decided against them not once, but twice.

7 The Services -- the document at issue is
8 document -- Pandora Trial Exhibit 1095, and the
9 Services first attempted to have this document
10 admitted through Pandora's expert, Dr. Katz.

11 JUDGE BARNETT: Do you know what,
12 Mr. Scibilia? I'm not going to hear this argument
13 this morning.

14 MR. SCIBILIA: Okay.

15 JUDGE BARNETT: You can put it down on
16 paper and give it to us.

17 MR. SCIBILIA: All right. Thank you,
18 Your Honor.

19 JUDGE BARNETT: We appreciate -- we know
20 you're going to oppose it, and that's -- you'll have
21 that opportunity.

22 As far as the timing, is the schedule
23 suggested by Ms. Mazzarello --

24 MS. MAZZELLO: Mazzello.

25 JUDGE BARNETT: Mazzello -- I wanted to

1 put an extra syllable in there. Is that acceptable?

2 MR. SCIBILIA: What was the timing, Your
3 Honor?

4 MS. MAZZELLO: We were suggesting next
5 Friday, the 21st, for the opposition.

6 MR. SCIBILIA: And you're submitting it
7 today?

8 MS. MAZZELLO: Yes.

9 MR. SCIBILIA: Okay. Then that's fine
10 with us, Your Honor. I -- I also -- I'm wondering
11 whether or not we're going to be receiving, you
12 know, a series of motions trying to revisit
13 evidentiary rulings made during this case, because
14 we're going to find that to be problematic for a
15 number of reasons.

16 JUDGE BARNETT: You're not the only one.
17 I don't think we're going to be receiving a series
18 of motions on anything at this stage, but this one
19 will be served today; we'll see what it is and
20 decide what to do with it.

21 MR. SCIBILIA: Thank you, Your Honor.

22 MS. MAZZELLO: Thank you, Your Honor.

23 JUDGE BARNETT: Mr. Lane?

24 MR. LANE: I'm unaware of any future
25 series of motions. And if Your Honors are ready to

1 proceed, Amazon would love to call what I think is
2 going to be the last and final witness here,
3 Dr. Glenn Hubbard.

4 MR. SCHMIDT: We do have one other
5 housekeeping matter. I'm sorry.

6 JUDGE BARNETT: Oh, Mr. Schmidt.

7 MR. WEIGENBERG: And I'll have one other
8 after that, so as -- so as not to break his promise.

9 JUDGE BARNETT: Okay.

10 MR. WEIGENBERG: But you first.

11 JUDGE BARNETT: Mr. Schmidt?

12 MR. SCHMIDT: So we -- we met and
13 conferred. As you remember yesterday, there was --
14 the Copyright Owners wanted more time to review
15 certain documents to determine whether they would
16 object to them. And we met and conferred, and it --
17 it sounds like everything is fine, so I would like
18 to, at this point, move into evidence those
19 exhibits, if that's all right with you.

20 JUDGE BARNETT: I think they were
21 provisionally admitted, but go ahead and give us the
22 numbers so we're clear.

23 MR. SCHMIDT: Okay. It's 733 to 737
24 inclusive, 752 to 753.

25 JUDGE BARNETT: Speak up, please.

1 MR. SCHMIDT: 733 to 737 inclusive, 752
2 to 753, 761, 770, 927, 1073, 1044, 1045, 1048, 1051
3 to 58, 1692, and 1688.

4 JUDGE BARNETT: Thank you.

5 (The following exhibits were admitted
6 that were not previously admitted on April 12, 2017)

7 (Pandora Exhibit Numbers 1052 to 1056
8 were marked and received into evidence.)

9 JUDGE BARNETT: Mr. Weigensberg?

10 MR. WEIGENBERG: Yes, thank you, Your
11 Honor. So, again, this being the last day, just
12 trying to clean up the house for good.

13 Exhibits 321 and 322, which Your Honors
14 may remember were the written testimonies of Quirk
15 and Sheeran for Phonorecords I, Your Honors had us
16 file designations and counterdesignations. I want
17 to confirm first that we did file those, ours and
18 the Services, on Friday as kind of a simultaneous
19 filing. So our understanding at this point is that
20 321, 322 are thus admitted.

21 The Services, I'll note, did have one or
22 two relevance objections to some of the -- the
23 transcript designations we had. So Your Honors have
24 those before you, but the documents themselves, 321
25 and 322, are admitted.

1 As to the -- the transcripts and the
2 designations and counterdesignations thereof, we
3 were wondering if Your Honors would like us to mark
4 those as new trial exhibit numbers so that the
5 parties may refer to them in our briefing, or file
6 replacements of 321 and 322, which then also contain
7 that in addition to the written testimony that was
8 previously provided.

9 JUDGE BARNETT: I would like you to
10 withdraw those massive transcripts and mark as 321
11 and 322 the designations with a cover, you know, the
12 title page and the relevant pages only.

13 MR. WEIGENSBERG: Absolutely, Your Honor.
14 And, sure, we will do that. And just for clarity,
15 we'll also have, on 321 and 322, the written
16 testimony which we previously offered and then,
17 following that, the excerpted version that you
18 referenced.

19 JUDGE BARNETT: Okay.

20 MR. WEIGENSBERG: Absolutely, Your Honor.

21 JUDGE BARNETT: And the excerpts will
22 include those counterdesignations, correct?

23 MR. WEIGENSBERG: Yes, and we will, I'm
24 sure, show that to the counsel for the Services
25 before then we then submit it to -- to Your Honors.

1 (Amazon Exhibit Numbers 321 and 322 were
2 marked and received into evidence.)

3 MR. WEIGENSBERG: Harking -- hearkening
4 back to day one of the -- the hearing, so going full
5 circle, there were four exhibits that we had
6 offered, which are 3220 through 3223 inclusive,
7 which Mr. Steinthal had said could be admitted,
8 subject to his being able to actually review the
9 exhibits, make sure that they were what we had said
10 that they were. We conferred that evening and with
11 -- with King & Spalding, and they confirmed that
12 Mr. Steinthal didn't have any objections. And so we
13 just want to state for the record that the parties
14 agree that those are, in fact, admitted. I don't
15 think that was stated on the record previously.

16 JUDGE BARNETT: Thank you for clarifying
17 that. Those --

18 MR. WEIGENSBERG: Sure.

19 JUDGE BARNETT: Those are admitted then.

20 (Copyright Owners Exhibit Numbers 3220
21 through 3223 inclusive were marked and received into
22 evidence.)

23 MR. WEIGENSBERG: Thank you, Your Honor.

24 MR. SCHMIDT: One more note.

25 JUDGE BARNETT: No, you've had your shot.

1 MR. SCHMIDT: I have. Ms. Whittle had
2 asked me to make a note on the record that the
3 exhibits that I just offered were offered for the
4 truth. So I wanted to make that note on the record
5 so it was clear.

6 JUDGE BARNETT: Thank you. Mr. Lane?

7 MR. LANE: At this point, Your Honor, I
8 would love to recall, on behalf of Amazon, Dr. Glenn
9 Hubbard.
10 Whereupon--

11 GLENN HUBBARD,
12 a witness, called for examination, having previously
13 been duly sworn, was examined and testified further
14 as follows:

15 JUDGE BARNETT: Good morning,
16 Dr. Hubbard. You remain under oath.

17 THE WITNESS: Good morning, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. LANE:

20 Q. At this point, I feel like we should sort
21 of break into a session of "Auld Lang Syne," but I
22 don't want to pay any royalties. So let's start.

23 Dr. Hubbard, you've already been
24 qualified as an expert by the Panel in the field of
25 applied microeconomics and industrial organization

1 economics on your direct. So welcome back?

2 A. Thank you.

3 Q. After you originally submitted your
4 written direct testimony in this proceeding, did you
5 have occasion to read and consider the Copyright
6 Owners' rate proposal and any written direct
7 testimony and any testimony during this hearing?

8 A. Yes, I did.

9 Q. And, in particular, did you read and
10 consider the written direct testimony submitted by
11 Dr. Gans, Rysman, and Eisenach?

12 A. I did.

13 Q. And did you ultimately submit to this
14 Panel written rebuttal testimony to respond and
15 rebut the Copyright Owners' rate proposal and any of
16 their witnesses' testimony?

17 A. Yes, I did, in the rebuttal report.

18 Q. I'm going to ask that you take a look at
19 what has been marked as Exhibit 132 in one of those
20 massive binders in front of you. It's 132.

21 A. Okay, I have it.

22 Q. Take a look at that, and let me know if
23 you recognize it.

24 A. Yes, it's the rebuttal report that I
25 filed and accompanying exhibits and the underlying

1 documents.

2 Q. If you could turn to the last page of
3 132, and let me know if your signature appears
4 there.

5 A. Yes, that's my signature.

6 MR. LANE: At this point, Your Honor, I
7 would offer Exhibit 132 into evidence.

8 MR. ZAKARIN: No objection.

9 JUDGE BARNETT: 132 is admitted.

10 (Amazon Exhibit Number 132 was marked and
11 received into evidence.)

12 JUDGE BARNETT: And heavily redacted.

13 MR. LANE: I'm going to try to do as much
14 as I can in non-restricted session. And I will
15 notify the Court at the appropriate moment.

16 JUDGE BARNETT: Thank you.

17 BY MR. LANE:

18 Q. If you could also take a look in that
19 same -- hopefully that same binder, at Exhibits 133
20 through 152, and let me know if you recognize those
21 exhibits.

22 A. Yes, those are the exhibits that I filed
23 at the end of my rebuttal report.

24 Q. And also take a look at Exhibits 153
25 through 248 in the binder.

1 A. Yes.

2 Q. And what do you recognize those to be?

3 A. These were documents that were referenced
4 in the report.

5 MR. LANE: Your Honor, at this point, I
6 would offer Exhibits 133 through 152 into evidence
7 for the truth of the matter asserted. Those would
8 be exhibits that he prepared in connection with his
9 report.

10 With respect to 153 through, inclusive,
11 248, those would simply be materials relied upon him
12 and not offered for the truth of the matter asserted
13 in the materials.

14 MR. ZAKARIN: No objection, Your Honor,
15 on that basis.

16 JUDGE BARNETT: Those exhibits are then
17 admitted on their respective bases.

18 (Amazon Exhibit Numbers 133 through 152
19 were marked and received into evidence.)

20 (Amazon Exhibit Numbers 153 through 248
21 were marked and received into evidence.)

22 MR. LANE: Thank you, Your Honor.

23 BY MR. LANE:

24 Q. So, Dr. Hubbard, I'd like to ask you some
25 questions about certainly your rebuttal testimony

1 today. I wonder if you could begin by summarizing
2 for the Panel the various conclusions that you
3 reached. And then we'll talk about some of the
4 details and probably get into restricted session at
5 that point.

6 A. Certainly. I -- I reached a number of
7 conclusions in the rebuttal report, which I prepared
8 a demonstrative. The first and the basic economic
9 point is that the existing flexible structure
10 expands the volume of legal music consumption. I
11 report a number of metrics of that in the -- in the
12 report, but that's the basic economic point.

13 The second piece of that is that the
14 evidence that I reviewed suggests that the copyright
15 holders have actually benefitted from this structure
16 and are likely to continue to benefit from this
17 structure in terms of royalties.

18 The third, going back to economic
19 principles, the proposal for a one-size-fits-all
20 structure is grounded neither in economic theory nor
21 in the reality of this market.

22 The fourth is that the flexible structure
23 that presently exists is what facilitates diverse
24 services that really get at differences in tastes,
25 preferences, and willingness to pay.

1 The fifth is that the structure with a
2 revenue-based mechanical royalty and alternative
3 calculations, i.e., the current framework, can
4 provide appropriate value to rightsholders. And I
5 provide examples of that.

6 And then I review the Rysman, Gans, and
7 Eisenach analyses pointing out problems they share
8 in common and problems they each have individually.

9 JUDGE STRICKLER: Excuse me, counsel.
10 Good morning, Dr. Hubbard. How are you?

11 THE WITNESS: Good morning, sir.

12 JUDGE STRICKLER: A question for you on
13 your second bullet point. You point out that the
14 rightholders have benefitted and will continue to
15 benefit from the existing structure. Yet, they
16 oppose the existing structure.

17 Given we've heard so much in this hearing
18 with regard to revealed preference, is it your
19 position, then, that the Copyright Owners just
20 misunderstand what's good for them?

21 THE WITNESS: Well, I can't, of course,
22 be that presumptuous, Your Honor. What I can
23 suggest is that the market that I see is one that is
24 segmented by tastes and preferences and willingness
25 to pay. And were the Copyright Owners to impose

1 their structure on this market, you would simply
2 lose pieces of the market that are already obtaining
3 royalties.

4 The question that has been asked, I
5 believe by yourself, Your Honor, repeatedly during
6 the proceeding is how do you look at two different
7 margins? One is new people coming in to music
8 consumption, and another, potential cannibalization
9 arguments that you've heard from the Rights Owners.

10 My reading of the evidence is that the
11 Rights Owners would be better off because of the new
12 entrants, that the cannibalization is not nearly of
13 the scale as new entrants, and, hence, I make the 00
14 the claim. The claim that they would continue to
15 benefit argues from two bases. One, the current
16 structure is generating gains from them; and, two,
17 the third-party sources that I cite that point to
18 continued gains in royalties to the rights owner.

19 JUDGE STRICKLER: Thank you.

20 BY MR. LANE:

21 Q. And sort of dovetailing with that,
22 Dr. Hubbard -- and you prepared these slides that
23 we're -- we're looking at today?

24 A. Yes, sir.

25 Q. Let me ask you, as a whole, do you find

1 that the Copyright Owners' world view reflects the
2 realities of the interactive streaming market?

3 A. I don't. And this actually gets at the
4 question Judge Strickler just asked. The way I
5 think about, writ large, the arguments that are
6 before the Panel are two different views of how a
7 market works. So the Copyright Owners' view is that
8 a streaming service that deviates from a high-priced
9 offering, what I would describe as the
10 high-willingness-to-pay piece, cannibalizes
11 streaming services that would pay higher royalty
12 rates, as opposed to being a different segment of
13 the market.

14 And a second view of the world is that
15 service providers are somehow not maximizing revenue
16 in front of them, that service providers can always
17 negotiate lower royalty rates with publishers. So
18 if the Panel were to set high rates, no harm, no
19 foul. And then, fourth, if the lower price services
20 were eliminated, somehow music users would just
21 migrate to high-priced services. That is my reading
22 of the Copyright Owners' view of the world. That is
23 not my reading of how the market looks.

24 So when I take each of those in turn, the
25 majority of music users, based on the third-party

1 information, based on the surveys done for this
2 proceeding, have low willingness to pay and would
3 consume free or low-price services only, including
4 possibly leaving legal services entirely.

5 Second, my reading of the evidence is
6 service providers would charge higher fees if they
7 thought they would increase revenues. For Amazon, I
8 see no evidence that they're not attempting to
9 maximize revenue on their services.

10 Third, on negotiation -- and this is an
11 important point because I believe this came up the
12 last time I was here as well -- while the publisher
13 market is concentrated, that is, the top few
14 publishers control a lot of the market, there's a
15 very long tail. And the notion of negotiation with
16 an entire long tail is a lot of transactions costs
17 and could lead to lopping off much or all of that
18 long tail, which would seem to me to be at odds with
19 the 801(b) factors.

20 More to the point, if most of the market
21 is in this low willingness to pay, it would seem to
22 subvert the very purpose of this hearing to just
23 suggest wholesale private renegotiation.

24 To the final point about why not just
25 move to higher priced services, again, this

1 misunderstands the market as it exists. It is -- it
2 exists because it's segmented by tastes and
3 preferences and willingness to pay, and it's not the
4 case that somebody who wouldn't pay yesterday
5 suddenly pays today, simply because that option is
6 cut off.

7 So I think there are two alternate views
8 of the world for the Panel's perspective. And that
9 would be my take on both.

10 MR. LANE: Your Honor, at this time, I
11 think we're about to move into some restricted
12 material, and I would ask that the courtroom be
13 closed.

14 JUDGE BARNETT: We will close the hearing
15 room to anyone who is not privy to restricted or
16 confidential information in this proceeding.

17 (Whereupon, the trial proceeded in
18 confidential session.)

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1 O P E N S E S S I O N

2 JUDGE BARNETT: Mr. Elkin?

3 MR. ELKIN: Yes, Your Honor, just a -- if
4 I may address the Court with respect to a process
5 matter. First of all, I want to thank the Panel for
6 all of its time and attention. This has been a very
7 interesting exercise for all of us, but I'm sure I
8 can speak on behalf of all of the participants, we
9 really appreciate the time and the effort and all of
10 the work associated with your presiding over these
11 proceedings.

12 I wanted to, if I could, make a
13 suggestion, I think, pursuant to the discussions
14 that we've had with the Copyright Owners related to
15 the June 7th closing argument. I think we've
16 decided that we could propose to the Panel, for the
17 Panel's consideration, that we would allocate two
18 hours per side on the closing arguments. That is to
19 say, the Copyright Owners would have two hours to
20 argue, and the Services, among themselves
21 collectively, would have two hours.

22 And I just wanted to, before we
23 adjourned, be able to present that to the Panel,
24 that proposal to the Panel.

25 MR. ZAKARIN: We're -- I have trouble

1 with this chair.

2 JUDGE BARNETT: I never did move that
3 table. I'm sorry.

4 MR. ZAKARIN: No need now. Somebody else
5 will suffer through it next week.

6 JUDGE BARNETT: Yeah.

7 MR. ZAKARIN: We're in agreement with
8 that. The only caveat I would -- I would offer is
9 because this is going to be post-briefing, which I
10 think broadly speaking will probably help the Panel,
11 to the extent that the Panel has questions and fires
12 questions at us, I can see, having experienced this
13 before, that both sides may end up going over two
14 hours, and it may be -- and the Panel may want us to
15 go over two hours based upon questions.

16 But I think in terms of argument time, we
17 would both, you know, want to limit ourselves,
18 subject to that caveat, to two hours.

19 JUDGE BARNETT: Agreed. We do tend to be
20 rather inquisitive.

21 MR. ZAKARIN: Which has been part of the
22 fun.

23 JUDGE BARNETT: And I -- I don't mean to
24 panic when I hear the word "briefing," but I think
25 what you mean is proposed findings and conclusions,

1 not a briefing.

2 MR. ZAKARIN: Yeah, but I define
3 "briefing" is a shorter way of saying a longer
4 thing.

5 JUDGE BARNETT: Thank you.

6 JUDGE STRICKLER: Are counsel thinking
7 about reserving time during the closings for
8 rebuttal closing? In other words, if you have two
9 hours each, do an -- an hour and 40 minutes and
10 reserving 20 for rebuttal? Or you haven't thought
11 that one through?

12 MR. ELKIN: We haven't discussed that,
13 although I think it might be appropriate.

14 JUDGE BARNETT: You're welcome to do
15 that. It's, you know --

16 MR. ZAKARIN: We haven't thought about
17 it. I mean, we haven't even discussed -- I mean, we
18 would think that since they went first, we would go
19 last on the closings, and we can discuss rebuttal,
20 whether that exists or whether that makes sense or
21 not. We're happy to have that conversation.

22 JUDGE BARNETT: Okay.

23 JUDGE STRICKLER: One other thing, just
24 by way of repetition and just acknowledging how much
25 everybody wants to help the Panel, which I really

1 appreciate, just to repeat that in the reply
2 findings and reply conclusions, please make certain
3 that the paragraph numbers line up to the paragraphs
4 to which you are responding. Because if you really
5 want to help the Panel, that's one way you can do
6 it.

7 MS. CENDALI: I just wanted to speak --
8 Dale Cendali for Apple -- the structure of this was
9 the -- I don't remember if it's A-B-A or however we
10 denominated it, but I don't think it would be
11 appropriate in the structure that we have for the
12 Copyright Owners to get to be the ones at the
13 closing getting to do the rebuttal. That's
14 inconsistent with the choices made with regard to
15 the structure.

16 JUDGE STRICKLER: You are saying that the
17 A-B-B-A should constitute the structure all the way
18 through? That's what you're saying?

19 MS. CENDALI: That's right. I mean, I've
20 never -- it would be very strange to have a
21 structure that -- that -- where you would have a
22 trial where the plaintiff would go and then the
23 opposing side would put in their case, and then
24 you'd have a rebuttal, and then at the closing, all
25 of a sudden, the effective defendant would suddenly

1 be in the position to put in their reply. I have no
2 idea if we're even going to do this, but I just
3 wanted to lodge an objection to that concept.

4 MR. ZAKARIN: I'm going to try,
5 hopefully, to alleviate Ms. Cendali's concern. I
6 had not raised the issue of potential rebuttal,
7 which is that we assumed that they would go first in
8 their closing and we will go next in our closing.
9 That would be the A-B structure. If there's going
10 to be a rebuttal, I don't know that it has to
11 follow, but that's something we can discuss. It was
12 just raised now.

13 But barring a rebuttal, it would be they
14 go first, we go second, we go home. Subject to that
15 possibility.

16 JUDGE BARNETT: Well, we can put a point
17 on this by saying there'll be no rebuttal. How
18 about that? Since there are so many people on this
19 side, then who gives a rebuttal and what it includes
20 might be logistically difficult.

21 MR. ZAKARIN: We're fine with that, Your
22 Honor.

23 JUDGE BARNETT: Two hours per side, and
24 it will be a pleasure. Mr. Semel?

25 MR. SEMEL: Yeah, I actually just wanted

1 to follow up on a couple points that you had raised.
2 You noted your -- your concern with the word
3 "briefing"; and the question we really wanted to
4 just clear up is to give you an opportunity to
5 enlighten us a little more on what you want because,
6 you know, at ten trials, we get ten different kinds
7 of formats for findings of fact and conclusions of
8 law, and I know Your Honors have in the same
9 proceeding received from different participants
10 sometimes a consolidated brief that's called
11 findings of fact, sometimes people make their
12 argument in one, sometimes people apply fact and
13 law.

14 But particularly because we have to
15 respond to five highly overlapping submissions, I
16 want to make sure that we're not having to respond
17 to a brief from one of them and an enumerated set of
18 findings of fact from another. So maybe if you
19 could give us some direction on how you want it.
20 Because also conclusions of law separate from
21 findings of fact and that sort of thing.

22 JUDGE BARNETT: The conclusions of law
23 are, I think, tantamount to a brief. We don't want
24 briefings. We will not accept any briefing.
25 There's no briefing. Submit something with a title

1 proposed findings of fact and conclusions of law,
2 and you would start with paragraph 1 --

3 JUDGE STRICKLER: Numbered. Numbered 1.

4 JUDGE BARNETT: Numbered 1, with your
5 proposed -- first proposed finding of fact. You
6 don't have to tell us how many people participated,
7 how many pages of exhibits we saw, who the witnesses
8 were. We get all that, okay? Just start with -- I
9 don't know, I can't even think of a proposed fact --
10 streaming music is -- you know, accounts for X, or I
11 don't know, whatever. What you propose the facts to
12 be.

13 And then follow that up with a set of
14 conclusions of law. Same document, maybe P-1 -- or
15 F-1 for facts and C-1 for conclusions. Or F-1 for
16 facts and L-1 for law.

17 MR. SEMEL: And are they numbered as
18 well? Are the conclusions of law numbered as well?

19 JUDGE BARNETT: Yes, numbered.

20 MR. SEMEL: And just following up to make
21 sure we're clear, you had sort of mentioned the
22 conclusions of law would be more like a brief. Do
23 you envision that the conclusions of law would have
24 application of fact to law?

25 JUDGE BARNETT: That's generally the

1 idea.

2 MR. SEMEL: So more like what we
3 typically call a post-trial brief or something like
4 that would go sort of more under the conclusions of
5 law section?

6 JUDGE BARNETT: Yes.

7 MR. SEMEL: Okay. Thank you.

8 JUDGE BARNETT: Otherwise, we would have
9 to guess at what your rationale is for your
10 conclusions of law.

11 MR. SEMEL: Understood.

12 JUDGE BARNETT: We probably could, based
13 on the volume of material we have, but it's easier
14 if you just tell us.

15 MR. SEMEL: And I think we can all work
16 out we're not going to -- prefixes or something so
17 that we're not dealing with multiple Number 1s on
18 the Service side.

19 MR. ZAKARIN: We discussed that and I
20 think Judge Strickler suggested, or maybe it was
21 Judge Barnett, that Amazon would be AM-1 or Apple
22 might be A-1, just so -- because we're going to be
23 responding.

24 JUDGE BARNETT: Correct.

25 MR. ZAKARIN: To a number of Services.

1 JUDGE BARNETT: I'm going to presume that
2 the five Services will have some overlap. And it's
3 okay if you respond once to all three or five or
4 whatever that say the same thing.

5 MR. SEMEL: And you had mentioned that
6 with the reply findings of fact that you would know
7 if there was a blank that you weren't responding to
8 that number, that's why you wanted the numbers.
9 With the conclusions of law, which, if I understand
10 it right, are more like a brief, can we agree that
11 or maybe can we get an understanding there won't be
12 any waiver if you don't respond to each paragraph in
13 somebody's briefing since we're going to be talking
14 about five sets? It's really the findings of fact
15 that you want to make sure that each one is
16 responding to, but the conclusions of law are -- we
17 don't necessarily have to respond to each argument
18 paragraph?

19 JUDGE STRICKLER: I don't know that I'm
20 speaking for the Panel, but I don't think we were
21 talking in terms of waiver, if you didn't have --
22 didn't respond. We're talking about ease of
23 reference for the Panel so that we can make the
24 determination as to how any Service or the Copyright
25 Owners has responded to a particular proposed

1 finding.

2 So if you leave it out, we may have -- we
3 may have our own determination and belief about it.
4 It's not a waiver per se, but it's -- it doesn't
5 help.

6 MR. ZAKARIN: Would it be easier if,
7 thinking about that, one side or the other side is
8 not responding, can we just have that numbered and
9 say no response necessary?

10 JUDGE STRICKLER: Yes, exactly. I think
11 that's the thing. So if you don't respond to Number
12 17, say "no response." Don't -- don't call your
13 response to 18, 17, and just leave it out. It will
14 be confusing.

15 MR. ZAKARIN: I agree.

16 JUDGE BARNETT: And my colleagues have
17 informed me that conclusions, responsive numbers
18 should be provided. It will be helpful. It -- it
19 doesn't necessarily mean that you disagree. It may
20 mean that you have a different approach or a
21 different aspect of an argument that you want to
22 present, but let's have them all dealt with.

23 MR. SCIBILIA: Can I just raise one final
24 housekeeping issue, which is in terms of the two
25 briefs that are going to be submitted, one now from

1 Amazon and one from Apple, I'm assuming because we
2 need to have a closed record for post-trial briefing
3 that they're just going to put in a brief or a
4 letter brief, and we're going to oppose it. There's
5 not going to be a reply brief process? It's just
6 going to be motion and opposition?

7 JUDGE BARNETT: Are you talking about
8 the --

9 MR. SCIBILIA: The Apple brief this
10 morning --

11 JUDGE BARNETT: From this morning?

12 MR. SCIBILIA: -- and the Amazon brief
13 now on the --

14 JUDGE BARNETT: Oh, yes, that is correct.
15 You're correct, Mr. Scibilia. And with regard to
16 regulatory terms, could you provide those in a
17 separate pleading, separate document, just proposed
18 regulations? And then likewise a separate response
19 to the other side's proposed regulations?

20 The regulations have paragraph numbers
21 anyway, so you don't need to especially number the
22 paragraphs there.

23 MR. ZAKARIN: Okay. And I would think
24 that if one side or the other -- I did that wrong.
25 One sides or the other side submits any changes --

1 and I think Judge Strickler indicated that has to be
2 done with the original briefing -- if you make any
3 changes to the structure or the regulations, I think
4 that Your Honors would probably want that to be
5 redlined from any prior version that has been
6 submitted, the original ones? So we'll do that.

7 JUDGE BARNETT: Yeah, because as of now,
8 or as of January 1st, those won't exist anymore. So
9 we'll need to know what it is you're looking for.

10 JUDGE STRICKLER: And you submitted
11 proposed rates and terms already.

12 MR. ZAKARIN: Yes.

13 JUDGE STRICKLER: So I'm presuming one or
14 more of the participants is going to want to revise
15 those to some extent.

16 MR. ZAKARIN: I think that's --

17 JUDGE STRICKLER: So that would -- I
18 imagine that you should track -- and, again, I'm not
19 speaking for the Panel -- but it would seem to make
20 sense that you would track what you've already
21 proposed in some way.

22 MR. ZAKARIN: To make red-line changes so
23 it's readily obvious to the Panel.

24 JUDGE STRICKLER: Is that what you're
25 referring to, when you say red-lining from your

1 original proposed --

2 MR. ZAKARIN: Yes. Exactly.

3 JUDGE STRICKLER: So any changes you
4 might make.

5 JUDGE BARNETT: Not from the original
6 regulations.

7 MR. ZAKARIN: No. From --

8 JUDGE BARNETT: Not from the existing
9 regulations. From your proposal.

10 MR. ZAKARIN: I mean, we can do that as
11 well but we can -- I was thinking there are
12 proposals in already from all sides. And if any
13 changes are going to be made, we would red-line that
14 to show the changes from what we've already put in.

15 JUDGE BARNETT: Thank you.

16 MR. ZAKARIN: Okay.

17 JUDGE FEDER: Also I would ask that the
18 -- that you, in addition, submit your proposed
19 regulatory language as a Word document.

20 MR. ZAKARIN: Sure.

21 JUDGE BARNETT: Yes.

22 MR. SEMEL: Did you not want all of the
23 papers also as Word documents? Because I know a lot
24 of courts have asked us to submit findings also as
25 Word documents.

1 JUDGE BARNETT: If we want them, we'll
2 ask for them, but I think just submit them as a PDF
3 as you normally do.

4 This is not good-bye. This is just until
5 we meet again on June 7th. Is that the correct
6 date? Thank you all. It has been a sheer pleasure.
7 And I look forward to the icing on the cake on June
8 7th. We are recessed until that point.

9 (Whereupon, at 12:07 p.m., the hearing
10 concluded.)

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1	C O N T E N T S				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	GLENN HUBBARD				
4		5893	5948	6004	
5					
6	CONFIDENTIAL SESSIONS: 5903-6007				
7					
8	E X H I B I T S				
9	EXHIBIT NO:	MARKED/RECEIVED		REJECTED	
10	AMAZON				
11	132		5892		
12	133 through 152		5896		
13	153 through 248		5896		
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15	322		5892		
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17	1052 through 1056		5890		
18	COPYRIGHT OWNERS				
19	3220 through 3223		5892		
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CERTIFICATE

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I certify that the foregoing is a true and
accurate transcript, to the best of my skill and
ability, from my stenographic notes of this
proceeding.

4/14/17

Ka. Bynnes
Signature of the Court Reporter

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